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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 201

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN, AND EUGENE DENNIS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PAUL L. ROSS,
MARTIN POPPER,
Counsel for Petitioners.

EARL B. DICKERSON,
PATRICK H. O'BRIEN,
ROBERT W. KENNY,
JOSEPH FORER,
BERNARD JAFFE,
Of Counsel.

THOMAS D. McBRIDE,
Of Counsel for Petitioner McCabe.

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Petitioners,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Harry Sacher, Richard Gladstein, George W. Crockett, Jr., Louis F. McCabe, Abraham J. Isserman, and Eugene Dennis pray that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit, made April 5, 1950 (3 R. 118), which affirmed orders of the United States District Court for the Southern District of New York, entered October 14, 1949 (1 R. 11-16), adjudging petitioners guilty of contempt of court and sentencing them to various terms of imprisonment for

alleged misconduct as defense counsel in the recent trial of the eleven leaders of the Communist Party.[1]

Opinions Below

The three judges who heard petitioners' appeal to the Court of Appeals each took a different view of the case, arrived at a different result, and wrote an opinion. Their opinions have not yet been reported, but appear in the record at 3 R. 1-117.

Statement of the Matter Involved

Eleven members of the National Committee of the Communist Party of the United States were tried in the District Court for the Southern District of New York on the charge (1 D. R. 4) of conspiring "to organize as the Communist Party of the United States of America a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence," in violation of section 3 of the Alien Registration Act of June 28, 1940, 54 Stat. 670-671, commonly known as the Smith Act.[2] *United States* v. *Dennis et al.*, No. C 128-87 in the Southern District.[3]

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[1] The record in this case includes the record of the trial in *United States v. Dennis et al.*, D. C., Southern District of N. Y., No. C 128-87. We use "D.R." to refer to the *Dennis* record and "R." to refer to other portions of the record in this case. Record references will be preceded by a numeral indicating the volume cited.

[2] The indictment thus charged a conspiracy under section 3 of the Smith Act to violate section 2 (54 Stat. 670). The conspiracy provision of the Smith Act, formerly contained in 18 U.S.C. 11, has been eliminated in the revision of 18 U.S.C. as being unnecessary in view of 18 U.S.C. 371, the general conspiracy section of the federal criminal code (See Reviser's Note to 18 U.S.C. 2385). Section 2 of the Smith Act, formerly 18 U.S.C. 10, appears in revised form in 18 U.S.C. 2385.

[3] The case is sometimes referred to (and so in the contempt certificate—

Each petitioner was counsel for one or more defendants in the *Dennis* trial. They are all attorneys, with the exception of petitioner Dennis, who was counsel *pro se* during the jury trial (1 R. 19), having been represented by petitioner McCabe during the preceding jury challenge hearing.

On October 14, 1949, the jury returned a verdict of guilty against all defendants in the *Dennis* case and was discharged (16 D.R. 12519-12522). Immediately thereafter, without notice, hearing, or other opportunity for defense, the trial judge (Hon. Harold R. Medina) adjudicated petitioners guilty of contempt of court for actions which had occurred during the trial (1 R. 81-86). This petition is addressed to the decision which affirmed the contempt orders.

The contempt certificate (1 R. 17-73), purportedly made pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, first recites that the criminal contempts were committed in the presence of the court and were seen or heard by the court. It then continues:

> By way of preliminary, I may say that I would have overlooked or at most merely reprimanded counsel for conduct which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might understandably have caused one to overstep the bounds of strict propriety. Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately entered into in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they

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1 R. 17) as *United States* v. *Foster*. William Z. Foster, chairman of the Communist Party of the United States, was a named defendant, but his trial was severed because of his illness (1 D.R. 186).

intended would result in a mistrial; and (3) impairing my health so that the trial could not continue.

I find that the acts, statements and conduct of each of the defendants, hereinafter specified, constituted a deliberate and wilful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial system, and misconduct of so grave a character as to make the mere imposition of fines a futile gesture and a wholly insufficient punishment. To maintain the dignity of the court and to preserve order in the court room, under these circumstances, was a task of the utmost difficulty. There was, accordingly, no alternative than to give the repeated warnings which from time to time I gave, and to postpone the impositions of the sentence until the close of the case. To have done otherwise would inevitably have broken up the trial and thus served the ends which these defendants tried so hard to attain. As isolated quotations from or references to the transcript can give but a partial view of the acts, statements, and conduct above referred to, I hereby make the entire record part of these proceedings.[4]

Accordingly, I adjudge the following guilty of the several criminal contempts described below:

The certificate then lists forty Specifications on which the petitioners were found guilty, Specification I being the only Specification on which all six petitioners were found guilty. Petitioner Sacher was found guilty on 22 other Specifications, Gladstein on 16, Crockett on 8, McCabe on 5, Isserman on 6, and Dennis on 4. (1 R. 18.)

Each petitioner was given an identical concurrent sentence on each Specification for which he was convicted. Sacher and Gladstein, who had the most Specifications, and Dennis, a layman who had the least, were sentenced to six

[4] The *Dennis* record so incorporated consists of more than 15,000 printed pages.

months imprisonment. Crockett and Isserman were sentenced to four months imprisonment, and McCabe to thirty days imprisonment. (1 R. 11-16.)

Specification I (1 R. 19-20), on which all petitioners were found guilty, and which was subsequently reversed on appeal, is an elaboration of the finding of a conspiracy to obstruct justice made in the initial portion of the certificate. It finds that the petitioners:

> . . . joined in a wilful, deliberate, and concerted effort to delay and obstruct the trial of *United States* v. *Foster, et al.*, C 128-87, for the purpose of causing such disorder and confusion as would prevent a verdict by a jury on the issues raised by the indictment, and for the purpose of bringing the Court and the entire Federal judicial system into general discredit and disrepute, by endeavoring to divert the attention of the Court and jury from the serious charge against their clients of a conspiracy in substance to teach and advocate the overthrow of the Government of the United States by force and violence, by attacking the Presiding Judge and all the Judges of this Court, the jury system in this District, the Department of Justice of the United States, the President of the United States, the police of New York City, and the public press of New York and other cities. (1 R. 19.)

Specification I then lists in subparagraphs a. through m. thirteen general types of conduct which, it finds, the petitioners engaged in "to effect this plan." The Specification does not identify or cite any particular episodes in which this conduct occurred. It is thus not possible to state which portions of the long record of the *Dennis* trial were considered by the trial judge to demonstrate the use of the listed conspiratorial methods. It seems reasonable to assume, however, that paragraphs a. through m. were meant to characterize generally petitioners' conduct in the particular epi-

sodes which are the subjects of Specifications II through XL.

As to the diversionary "attacks" referred to in the forepart of Specification I, identification is also lacking in the Specification. However, it may confidently be assumed, on the basis of a familiarity with the record, that they refer to various motions made by petitioners in the *Dennis* case.[5]

Specifications II through XL (1 R. 20-73) refer to particular, identified episodes which occurred during the nine months of the *Dennis* trial. One to five of the petitioners were found guilty on each of these Specifications. The versions given in the contempt certificate of the incidents which

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[5] The "attack" on the jury system of the District apparently refers to a challenge to the grand jury and petit jury array filed by petitioners and tried by Judge Medina prior to the jury trial. The theory of the challenge was that the jury selection system of the Southern District discriminates in favor of propertied classes and against the poor, manual workers, Negroes, Jews, and other groups. See 17 D.R. 13038-13075. For challenge motions, rulings, etc., see 17 D.R. 13033-13157. The challenge hearing is 1-3 D.R.

The "attack" on the judges of the District apparently refers to a motion by petitioners that the jury challenge be tried by a judge from an outside District. See 17 D.R. 13148.

The "attack" on the Department of Justice apparently refers to objections made by petitioners to the issuance by the Federal Bureau of Investigation of a press release praising a prosecution witness then on the stand "for patriotic assistance to the United States Government" in spying for the FBI while a member of the Communist Party. See 7 D.R. 5064 ff.

The "attack" on the President apparently refers to a motion for mistrial based on the making of a public statement by President Truman on the eve of the opening of the jury trial that petitioner Dennis and William Z. Foster were traitors. See 17 D.R. 13223 ff.

The "attack" on the police of New York City apparently refers to protests against the actions of the police on the day the trial opened in throwing a large cordon of armed, uniformed police around the courthouse and in corridors and rooms of the building. See 1 D.R. 55-82.

The "attack" on the press apparently refers to defense motions for postponement of the trial and mistrial because of the prejudicial climate caused by the inflammatory comment of newspapers and others. E. g., 17 D.R. 12880, 12976, 13323, 13507.

are the subject of Specifications II through XL are inaccurate and misleading when compared to the record.[6]

The 39 incidents which Specifications II through XL involve were selected from three months of the jury challenge hearing and six months of the jury trial. The first of these incidents (Specification II, 1 R. 20) occurred on January 21, 1949, nine months before the contempt adjudications. The latest (Specification XL, 1 R. 72, charged against petitioner Dennis only) occurred on October 4, 1949, ten days before the contempt adjudications. The last incident charged against petitioner McCabe (Specification XXVII, 1 R. 51) occurred on June 3, 1949, against Isserman (Specification XXXII, 1 R. 57) on August 3, 1949, against Gladstein (Specification XXXV, 1 R. 67) on August 26, 1949, and

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[6] We concur with the view of the trial judge (1 R. 18) that the particular incidents do not standing by themselves adequately reflect what occurred. In addition, the descriptions of the incidents as given in the Specifications are misleading on account of misstatements of the record, omissions of relevant matter, and exaggerated characterizations. See the record as follows: as to Specification II, 1 D.R. 383-384; Specification III, 2 D.R. 933; Specification IV, 2 D.R. 1031-1037; Specification V, 2 D.R. 1053-1059; Specification VI, 2 D.R. 1085-1092; Specification VII, 2 D.R. 1133-1142; Specification VIII, 2 D.R. 1660-1661, 1669-1671; Specification IX, 3 D.R. 2095-2098; Specification X, 3 D.R. 2383-2386; Specification XI, 3 D.R. 2403-2404; Specification XII, 3 D.R. 2528-2529; Specification XIII, 5 D.R. 3942-3944; Specification XIV, 5 D.R. 4058-4059; Specification XV, 6 D.R. 4228-4230; Specification XVI, 6 D.R. 4786-4790; Specification XVII, 6 D.R. 4806-4807; Specification XVIII, 6 D.R. 4829-4862; Specification XIX, 7 D.R. 4962-4970; Specification XX, 7 D.R. 5301-5302; Specification XXI, 7 D.R. 5524-5526; Specification XXII, 8 D.R. 6250-6280; Specification XXIII, 8 D.R. 6401-6402; Specification XXIV, 8 D.R. 6519-6522; Specification XXV, 8 D.R. 6552-9 D.R. 6565; Specification XXVI, 9 D.R. 6760-6763; Specification XXVII, 9 D.R. 6839-6847; Specification XXVIII, 9 D.R. 6934-6937; Specification XXIX, 9 D.R. 7085-7088; Specification XXX, 10 D.R. 8042-8045; Specification XXXI, 12 D.R. 9375-9377, 9403-9406; Specification XXXII, 12 D.R. 9508-9584; Specification XXXIII, 12 D.R. 9730-9731; Specification XXXIV, 13 D.R. 9885-9887; Specification XXXV, 14 D.R. 10747-10748; Specification XXXVI, 14 D.R. 10855-10856; Specification XXXVII, 14 D.R. 11210-11213; Specification XXXVIII, 15 D.R. 11418-11423; Specification XXXIX, 15 D.R. 11432; Specification XL, 15 D.R. 11925-11933, 12047-12065.

against Sacher (Specification XXXIX, 1 R. 72) and Crockett (Specification XXXVIII, 1 R. 70) on September 14, 1949—that is, over four months, over two months, a month and a half, a month, and a month before the date of the contempt adjudication.

When the incidents which constitute Specifications II through XL are examined in the record it appears that they were combed from the record toward the close of the trial, that their inclusion in the contempt certificate did not reflect the trial judge's contemporaneous reaction to the events or a contemporaneous belief that they were contemptuous and obstructive, and that the meaning and quality given them in the contempt certificate was assigned after their occurrence. Thus a number of the incidents went completely unnoticed and unrebuked at the time of occurrence.[7] Certain others occasioned admonitions, often minor in tenor, at the time of occurrence, which terminated the incidents without indication by the court that additional punishment was warranted or required.[8] Apt illustrations of the coloration given to incidents by adjudication made long after the event are supplied by Specifications II and VII. Specification II, entered on October 14, 1949, asserts that petitioner Sacher shouted at the Court on January 21, 1949 (1 R. 21). But when Sacher made the remark which is the subject of the Specification the judge took no notice of it and made no mention of shouting (1 D. R. 384-385). Indeed, a few days later the judge commented that Sacher had always spoken "in good taste" (1 D. R. 467-468). Similarly, Specification VII recites that Sacher angrily shouted on

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[7] *Cf.* Specifications II, III, IV, XII, XIII, XV, XVI, XXI, XXIII, XXVI, XXIX, and XL with applicable record portions indicated in footnote 6, *supra*.

[8] *Cf.* Specifications V, VI, VII, VIII, IX, X, XI, XIV XVIII, XIX, XX, XXII, XXIV, XXV, XXVII, XXVIII, XXXI, XXXII, XXXIII, XXXIV, XXXV, XXXVI, XXXVII, and XXXIX with applicable record portions indicated in footnote 6, *supra*.

February 4, 1949 (1 R. 28). The record shows that on that date the judge asked Sacher to "lower your voice a little bit," and Sacher replied, "All right, your Honor, I am sorry if I am carried away" (2 D. R. 1138).

The contempt certificate asserts (1 R. 18) that it was necessary to postpone the contempt adjudication and sentencing till the end of the *Dennis* trial in order to avoid breaking up the trial.[9] As already indicated, however, a number of the incidents were included in the contempt certificates as after-thoughts and were not contemporaneously considered to be contemptuous or obstructive. In addition, eleven of the incidents in the contempt certificate (Specifications II through XII) occurred during the jury challenge, which was heard without a jury. There was a recess of six days between the end of the challenge hearing and the beginning of *voir dire*, during which period no action against petitioners was taken or suggested (See 3 D. R. 2557).

The contempt certificate expressly finds that the actions described in the Specifications "were the result of an agreement between these defendants, deliberately entered into in a cold and calculating manner" to impair the trial judge's health (1 R. 17). The trial judge's view that petitioners were seeking to harass and attack him personally is also elaborated in sub-paragraphs a. through m. of Specification I (1 R. 19-20).

In addition, throughout the *Dennis* trial, the judge openly manifested contempt and hostility toward petitioners and a belief that they were his personal enemies. For example, in open court Judge Medina accused one petitioner of having "deliberately lied" a month earlier.[10] When the peti-

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[9] Of course, the explanation, even if accepted, does not explain why a hearing could not have been held once the adjudication and sentencing had been postponed till the end of the trial.

[10] In reversing Specification XV the Court of Appeals held that there was no basis for the accusation (3 D.R. 18).

tioner expressed resentment, the judge charged that "if you thought you could, you might physically come up to the bench and physically attack me" (9 D. R. 7029).[11]

Throughout the *Dennis* trial, the trial judge expressed the belief that petitioners were engaged in some plot against him personally, the conduct of the trial, and the federal judicial system. The existence of this plot occurred to him as early as the beginning of the second day of testimony in the jury challenge (1 R. 465). A few days later he formally found that the plot existed (2 D. R. 1279), and thereafter he repeated the finding (17 D. R. 13116). Throughout the jury challenge hearing and the jury trial, the trial judge constantly asserted or insinuated that petitioners' motions, objections, arguments, examination of witnesses, scrutiny of prosecution exhibits, etc., were not matters of ordinary and necessary advocacy but were instead manifestations of a conspiracy to disrupt the trial and dis-

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[11] For another instance in which the judge, obviously without warrant, supposed a threatening approach by a petitioner, see 2 D.R. 1670. For other instances in which the trial judge accused petitioners of lying, see 7 D.R. 5316, 9 D.R. 7029, 11 D.R. 8888, 14 D.R. 10560, 10718-10719, 3 D.R. 2092.

Illustrative of the judge's hostile method of addressing petitioners are the following: "I am through being fooled with in this case" (3 D.R. 2276). "If you don't like it you can lump it" (*ibid.*). ". . . up to that same old monkey business again" (3 D.R. 2088). ". . . . just a lot of big talk" (3 D.R. 2083). "People of your kind resent that sort of thing because they want to keep talking all day" (3 D.R. 2251). "You can argue your head off" (3 D.R. 1923). "If you ever get so that you can control your face, I am afraid you will be in a bad way" (3 D.R. 1947). "I don't intend that a single one of you lawyers for the defense shall get away with anything while I am sitting here" (8 D.R. 5902). "Object your head off" (8 D.R. 6116, 11 D.R. 8444). "We will have no more monkey business here" (12 D.R. 9533). For other instances of abuse of petitioners by the judge, see the incomplete collection at 17 D.R. 13524-75, 13601-13606, 13613-13614.

One of the issues in the appeal, now pending, of the *Dennis* case is alleged prejudicial misconduct of the trial judge.

credit the administration of justice.[12] See, e. g., 2 D. R. 1091, 1279, 1299, 1325, 1660-1669; 3 D. R. 2293; 5 D. R. 3488-3489, 3495-3496, 3507-3508, 3636; 6 D. R. 4272, 4539, 4580-4581; 7 D. R. 4597-4598, 5153; 8 D. R. 6116, 6129-6134; 9 D. R. 7020; 10 D. R. 7409, 7930-7931, 8009; 11 D. R. 8163-8166, 8170-8173; 15 D. R. 11889.

The three judges who heard petitioners' appeal to the Court of Appeals for the Second Circuit each took a different view of the case and each wrote an opinion (3 R. 1-117).

Judge Augustus N. Hand voted to affirm Specification I. Judge Frank voted to reverse Specification I on the grounds that the appellants could not be convicted of the conspiracy found therein except after a hearing before a judge other than the trial judge. Since Judge Clark voted to reverse all the Specifications, the convictions on Specification I were reversed by the Court.

Judges Hand and Frank took the view that Specifications II through XL had a status independent of the conspiracy finding. They affirmed the convictions on all these Specifications except that they voted to reverse on the merits as to Sacher's convictions on Specifications XV and XVIII. In treating the merits of Specifications II through XL, Judge Hand's opinion (concurred in by Judge Frank in that respect) seems to have adopted the contempt certificate's

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[12] This attitude is fully evinced in Specification I of the contempt certificate. There the trial judge finds as conspiratorial "attacks" against the administration of justice petitioners' making of a jury challenge and motions addressed to securing a fair jury, a fair environment of trial, and a fair trial. See *infra*, footnote 5. The challenge and motions were all of substantial merit and were of conventional, legal types. Specification I also finds that among the means of carrying out the conspiracy was the making of unsubstantial arguments and objections. The entire record conclusively demonstrates that the judge considered that appellants were conspiring to frustrate justice in attempting by earnest and energetic legal advocacy to obtain the acquittal of their clients.

description of the episodes involved, as distinguished from what appears in the record of the *Dennis* trial.[13]

Judge Clark dissented on the ground that a hearing was required before appellants could be convicted and punished for alleged contemptuous conduct which had occurred long before the adjudication.

Jurisdiction

The judgment of the Court of Appeals was entered on April 5, 1950 (3 R. 118). A petition for rehearing before that court was denied on May 15, 1950 (3 R. 153). By order dated May 23, 1950, Mr. Justice Jackson extended the time for filing this petition for certiorari to and including July 14, 1950 (3 R. 155). The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254 (1).

Questions Presented

1. Whether the summary conviction and sentencing of petitioners for criminal contempt, without notice, hearing, or other opportunity to answer or defend, were consistent with due process and within the power of the trial judge where a substantial time had elapsed since the occurrence of the alleged contemptuous incidents and the trial in which they occurred had been concluded.

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[13] An apt illustration is afforded in the affirmance of Isserman's conviction on Specification VII. That Specification, held by the Court of Appeals to be sustained by the record, states in part: "Mr. Isserman proceeded to argue the matter after the objection was sustained" (1 R. 26). The Court of Appeals stated in part: "In VII, Isserman persisted in argument. . . ." (3 R. 24). The record shows that after the trial court had sustained the objection the following occurred (2 D.R. 1133):

> "Mr. Isserman: Will your Honor hear me?
> The Court: I will hear you."

Nor did the court direct Isserman to close the argument, as suggested in the Specification (*Cf.* 1 R. 26 with 2 D.R. 1134).

2. Whether the trial judge could lawfully convict and punish petitioners without notice or hearing after the conclusion of a nine-months trial on the basis of episodes combed from the record of the trial and endowed in the contempt certificate with a quality and significance which the trial judge did not ascribe to them at the time of their occurrence.

3. Whether, under the circumstances stated in 1 and 2, the trial judge could lawfully convict and punish petitioners for acts considered to be disrespectful to and critical of him.

4. Whether the trial judge could so convict and punish petitioners where he found that they had agreed to engage in conduct intended to impair his health and where he had expressed the belief that they were his personal enemies ready to attack him physically and seeking to discredit him as a judge.

5. Whether it was erroneous for the Court of Appeals to affirm the convictions and sentences on the basis of particular acts set forth in Specifications II through XL, when the actual basis for the convictions and sentences was the trial judge's erroneous finding of a conspiracy, which the Court of Appeals reversed.

6. Whether the contempt certificate violates Rule 42 (a) of the Rules of Criminal Procedure by incorporating by reference the entire record in the trial of *United States* v. *Dennis, et al.*

7. Whether the record supports the convictions and sentences imposed on petitioners.

8. Whether under all the circumstances the punishments imposed are excessive.

Statute and Rules Involved

Title 18, United States Code, Section 401:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehaviour of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehaviour of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42 of the Federal Rules of Criminal Procedure:

"Rule 42. Criminal Contempt

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is dis-

qualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Rule 32 (a) of the Federal Rules of Criminal Procedure:

"Rule 32. Sentence and Judgment

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

Reasons for Allowing the Writ

The writ should be granted because the issues herein present questions of Federal law of great legal and public importance, which should be settled by this Court; because the Court of Appeals has decided these important questions in a way which conflicts with constitutional principles and applicable decisions of this Court; and because the Court of Appeals has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I

Summary punishment without notice and hearing for contempt committed in the presence of the court is the one exception in our system of jurisprudence to the requirement that every accused, even if apprehended *in flagrante delicto*, is entitled to a hearing and an opportunity to defend himself. This lone exception to the requirements of procedural due process has been tolerated only on the theory that it is needed to enable courts to function. It is available not be-

cause the right to be heard is derogated when the court is injured, but only because there prevails a superior consideration. A hearing must go by the boards when, and only when, there is no time for hearing if demoralization of the court's authority is to be averted.[14] Only the overriding necessity for immediate punishment justifies denial of hearing. *Re Oliver*, 333 U. S. 257, 275.

The power to punish for contempt without a hearing obviously carries oppressive possibilities. Furthermore, its use tends to injure the administration of justice by impairing public confidence in the integrity and fairness of our judicial system. "It is of the greatest importance that contempt proceedings be put, as far as possible, beyond the reach of even unjust adverse criticism." *Cornish* v. *United States*, 299 Fed. 283, 285, cited with approval in *Cooke* v. *United States*, 267 U. S. 517, 539. For these reasons and because of the exceptional quality of the power, this Court has insisted that the power may be exercised only in the most narrowly confined circumstances. *Cf. Cooke* v. *United States, supra; Re Michael*, 326 U. S. 224; *Re Oliver, supra*.

This case presents, as Judge Clark pointed out below (3 R. 113), "a unique judgment of summary contempt." For the first time in American history lawyers have been sentenced to substantial terms of imprisonment for allegedly contemptuous courtroom conduct. They were so sentenced without a hearing, long after the events had occurred, and at

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[14] But Justice Holmes pointed out that the English courts, even "in more violent days than these," have been able to maintain their authority without using summary punishment for contempt. *Gompers* v. *United States*, 233 U. S. 604, 612. And several American states have without catastrophe abolished the judicial power to punish without hearing for direct contempts. See *Deskins* v. *State*, 62 Cr. (Okla.) 314, 71 P. 2d 502; *Harding* v. *McCollough*, 236 Iowa 556, 19 N. W. 2d 613; *Ex parte Redmond*, 156 Miss. 582, 126 So. 485. Even a court-martial must allow a hearing to one accused of having committed contempt in the face of the court. *Manual for Courts-Martial United States Army*, corrected to April 20, 1943, p. 91.

a time when the granting of a hearing would not have impeded the business of the court or the maintenance of its authority. The episodes on which these convictions without hearing have been sustained were combed out of a nine-months record, and in the culling process the incidents were endowed with a significance and quality which were not contemporaneously considered to be present. The punishment was imposed on petitioners without a hearing by a judge who obviously considered them his personal enemies, who had manifested great bitterness toward them, who had clashed with them throughout a long, hard-fought trial, and who had expressed a conviction that they were plotting to impair his health, to discredit him as a judge, and to subvert the judicial system. Finally, the Court of Appeals sustained the judgment although reversing as erroneous the finding on which the trial judge expressly based the convictions and punishment.

This novel and comprehensive extension of the power to punish for contempt without hearing raises important fundamental issues. Here if ever the "right to be heard in open court before one is condemned" has been "whittled away under the guise of 'demoralization of the court's authority.'" *Re Oliver*, 333 U. S. 257, 275, 278. The expansion of the contempt power made by the decision below establishes a dangerous precedent. It threatens the right of the American people to be represented fearlessly and vigorously by counsel. As Judge Clark pointed out in his dissent below (3 R. 117):

> . . . we cannot afford to overload the sacred responsibility of providing adequate defense for all to the point where it cannot practically be fulfilled. It is no secret that the difficulty of securing counsel to defend adequately unpopular minority groups is great, and indeed acute in non-metropolitan districts. On the other hand, the insistence upon counsel as a part of the con-

> stitutional element of a fair trial is more pronounced, more precisely stated, each judicial term. There may be approaching the dilemma that trial cannot be had without counsel, and yet none can be found for the burdensome job.

The decision below, moreover, establishes a procedure which tends to intimidate counsel in all cases. No matter who the parties or what the nature of the case, no trial lawyer is safe in carrying out his high obligation of vigorous defense of his client even to the point of resisting a judge's misconduct or oppression if he can be punished without hearing by the same judge, on the basis of incidents singled out as contempts long after they had occurred in the trial which had terminated.

The decision below, if unreversed, establishes a precedent which has neither justice nor the appearance of justice. It upholds the power of a judge to condemn without a hearing those against whom he is personally embittered for their alleged attacks on him, at a time when no possible reason exists for dispensing with a hearing before a neutral judge. This precedent is established, furthermore, in a case which involved lawyers for the leaders of an unpopular political party, tried for their political advocacy in a hostile public environment.

The entire record fully demonstrates that petitioners were punished, whether or not the trial judge was conscious of the fact, not because they were contumacious or obstructed the trial or sought to discredit our judicial system, but because they vigorously defended the leaders of the Communist Party. But it is enough to warrant review by this Court that the Court of Appeals has approved a procedure which facilitates the type of oppressive judicial action here suggested, and this without any over-riding consideration in favor of the procedure.

We are witnessing presently savage attacks not only on Communists and others who defend their rights but on the civil liberties of the American people as a whole, liberties which are indispensable to the maintenance of a free society. Now, perhaps more than ever before, it is vital that judicial action be calm, impersonal, consonant with due process, and procedurally discreet. We cannot afford to return to the practices which resulted in the disbarment of Zenger's counsel (see *Trial of John Peter Zenger*, 17 How. St. Tr. 675) and the mistreatment of lawyers who defended those accused under the Alien and Sedition Acts. The correct course in this case was that advised in Judge Clark's dissenting opinion below: "I know of no wiser course than to proceed deliberately according to the wisdom of the law as developed in other and perhaps less emotional times, and to approach judgment and punishment deliberately, but by that course the more surely and justly" (3 R. 117).

II

The decision below represents a departure from basic principles of law established by decisions of this Court.

A

The courts are limited in the exercise of the exceptional, drastic, summary contempt power "to the least possible power adequate to the end proposed." *Re Michael*, 326 U. S. 224, 227; *cf. Anderson* v. *Dunn*, 6 Wheat. 204, 231. This end is only for "the present protection of the court from actual interference, and not to postponed retribution for lack of respect for its dignity." Mr. Justice Holmes, dissenting in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 423; dissenting opinion adopted as the majority view in *Nye* v. *United States*, 313 U. S. 33. Mr. Justice Holmes continued (at 425):

> I would go as far as any man in favor of the sharpest and most summary enforcement of order in court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with any other illegal acts.

In the *Nye* case, *supra*, the Court reaffirmed the principle that punishment without hearing was available only to prevent an instant "demoralization of the court's authority" and to meet "the need for immediate penal vindication of the dignity of the court" (at 536). And in the *Cooke* and *Oliver* decisions, *supra*, this Court again expressly limited the exercise of the power to situations which require instant action.

Since the power is predicated on a need for instant action, it obviously is not available once the time for its necessity has passed. This principle is laid down flatly in *Re Terry*, 128 U. S. 289, 312 (emphasis added).

> It was within the discretion of that Court, whose dignity he had insulted and whose authority he had openly defied, to determine whether it should, upon its own view of what occurred, proceed *at once* to punish him *or* postpone action until he was arrested upon process, brought back into its presence, *and permitted to make defense.*

In the present case, the alleged contemptuous acts had occurred long before (some as long as nine months before) the contempt adjudication and sentencing. The trial in which the acts had occurred had come to an end. There was no emergency which required or warranted dispensing with a hearing. The punishment imposed was therefore not "a present protection of the court" but "postponed retribution." Accordingly, there was not present the only factor which permits dispensing with a hearing. Thus the con-

viction of petitioners without a hearing was a flagrant violation of procedural due process.

It is no answer, as contended by the government below, that the court could have punished for the acts when they occurred, and hence that petitioners were not harmed by postponement of adjudication. Such an answer makes the cardinal error of expanding by "logic" a limited exception to the point where it swallows the rule. What harmed petitioners was the absence of a hearing. This was an injury they might have had to endure if and when it was required by the need for immediate vindication of the court's authority. But at any other time petitioners were protected against such an injury by ordinary standards of due process.

Furthermore, the postponement of adjudication harmed petitioners by resulting in their conviction on the basis of a retrospective view of the incidents involved, a view conditioned by the trial judge's appraisal of subsequent events. As Judge Clark stated below: "If the judge had acted immediately to punish summarily what he deemed to be contempts, he would have done so as a responsible decision upon the need then apparent to him; and the issue which would thereupon have been presented to a reviewing court would have been quite different from that now before us" (3 R. 115).

Nor is it an answer, as suggested in Judge Frank's opinion below (3 R. 102), that it was more convenient for the judge to postpone adjudication in order to avoid writing contempt certificates during the pendency of the trial. Basic constitutional rights may not be frittered away to serve administrative advantages, even if they are more weighty than that indicated here. As to such rights "there can be no compromise on the footing of convenience or expedience, or because of a natural desire to be rid of harassing delay."

Ohio Bell Telephone Co. v. *Commission*, 301 U. S. 292, 305. Moreover, if it was more convenient to delay, there was nevertheless no reason, once having delayed, for denying a hearing. And it is true, of course, that the lengthy contempt certificate was in fact written during the trial, since it was invoked at the moment the jury was discharged (1 R. 80-81).

Nothing in Rule 42 permits the fundamental deviation from due process manifested in this case, nor could it do so in the face of the constitutional mandates. Subsection (a) of the Rule obviously can not be considered to overrule the constitutional principles which had been well established when the Rule was drafted. The fact is that the trial judge failed to employ the permissive provisions of 42 (a) at the one time when they were constitutionally available. Thereafter 42 (b) was the controlling rule, and under its express terms, since the contempt charged involved disrespect to or criticism of the trial judge, he could not himself hear the contempt. Rule 42 (b) obviously is designed to serve the constitutional principle that no man should adjudge a controversy in which he is an injured party. The decision below frustrates both the rule and the constitutional principle.

The decision below thus contravenes important principles of the law of contempt established by the decisions of this Court. Judge Augustus Hand, however, considered that whether contempt punishment could be imposed without hearing long after the occurrence of the event was a question which had been left open by this Court in *Ex parte Terry*, 128 U. S. 289, 314, and *Pendergast* v. *United States*, 317 U. S. 412, 419. Even on Judge Hand's view, therefore, a firm basis is supplied for the granting of review by this Court.

However, a correct reading of *Terry* shows that this question was not left open; on the contrary, the Court expressly

declared (at 312) the need to allow opportunity for defense once a real interval of time elapsed between the commission of the act and the time of judgment. The conviction was affirmed because the trial court had not postponed action. The only question which was left open in *Terry* was this: when the need for immediate punishment arises, and the contemnor departs in defiance of the court's authority, may the court on a later day punish the original contempt without first giving a hearing. The court never questioned, but expressly asserted, the need for a hearing if the defendant had not defiantly left and nevertheless punishment had not been immediately imposed.

Judge Frank, while taking a different view of the *Terry* case than Judge Hand, held that here the deferred adjudication without a hearing was permissible because the petitioners had "voluntarily returned" to the court room after the alleged contempts were committed. Thus under Judge Frank's logic, petitioners were rightly denied a hearing because they voluntarily returned to the court for the sole purpose of defending their clients. But, under his view, if they had not so returned but had been brought back under compulsory process, then under the *Terry* rationale a hearing would have been required. Such a theory has no rational basis, nor does it find support in any reported decision.

Only Judge Clark's opinion addressed itself to the point—that since the power to punish without hearing exists only to serve a need for immediate vindication of the court's authority, its purpose and legitimacy vanish once that need has gone.

B

The Court of Appeals rewrote the judgment below by treating as surplusage its expressed rationale. If the words used by the trial court in the contempt certificate are to be given any meaning, then it appears that the certificate is a unified document which rests on the basic finding of a con-

spiracy to obstruct justice. It likewise appears that the trial judge convicted and punished petitioners for the incidents in Specifications II through XL only because they were, in his opinion, the fruit of, or at least accompanied, such a conspiracy. This analysis, derived from the language and structure of the contempt certificate, is corroborated by the circumstance that a number of the incidents were, even on the face of the certificate itself, obviously too minor to warrant independently imprisonment or even a finding of contempt (see *e. g.*, Specifications IV, VII, XII, XV, XXIV, XXX, XXXIII, XXXIV, XXXVI, XL). Furthermore, on no other basis is there a legitimate explanation for the imposition of the severest sentence on Dennis, a layman who was charged in the fewest Specifications.

Nor is this analysis in any way contradicted by the imposition of separate, concurrent sentences on each Specification. For each Specification was, under the trial court's manifested theory, deserving of punishment not in isolation but as the fruit of a conspiracy.

Nevertheless, the Court of Appeals, though reversing the finding of a conspiracy, sustained the convictions and sentences on the basis of the particularized Specifications. The practical result is that petitioners are being punished for a conspiracy which, it has been held, was not legitimately found against them. Certainly they can not be constitutionally punished for conduct which was found contemptuous not by the trial court but by the appellate court which did not see those acts and which did not have the function of adjudicating them. *Cf. Cole* v. *Arkansas*, 333 U. S. 196.

If the construction of the certificate by the court below is correct, then indeed an anomaly occurred. For then not only have petitioners been convicted without a hearing, but they have also been convicted and sentenced without first having been informed of the offenses they committed. The

record shows that prior to imposing sentence the trial court read only the introduction of the contempt certificate and Specification I (1 R. 81-86). Specifications II through XL were not read, nor were copies furnished petitioners at any time before conviction and sentence. The trial judge, then, notified petitioners only of the conspiracy Specification and not of the remaining Specifications, which have now been held to be the only matters as to which the judgments can be sustained. Yet obviously notice of one charge is no notice of an entirely different charge.

By affirming the convictions on the basis of Specifications II through XL while reversing the conspiracy finding, the Court of Appeals in effect rewrote the trial court's judgment to respond to its own reactions. Essentially it committed the same type of error which occasioned its reversal by this Court in *Kotteakos* v. *United States*, 328 U. S. 750.

In the *Kotteakos* case, the Circuit Court affirmed a conviction on the basis that an erroneous charge to the jury was surplusage because the evidence fully sustained a finding of guilt on a proper theory of the case. This Court reversed on the ground that the determination of guilt was a matter for the jury, not for the Circuit Court, and it could not be said with fair assurance that the jury had not been influenced by the erroneous theory advanced in the charge. So here it can not be fairly said that the trial judge, who was responsible for the finding and sentencing, had not been influenced by the conspiracy finding which he had no right to make. On the contrary, all the evidence is to the effect that the conspiracy finding gave overwhelming impulse to his judgment and sentence and was in fact its rationale.

Indeed, the judgments must be reversed even if the erroneous conspiracy finding merely affected the degree of punishment. Thus in *Townsend* v. *Burke*, 334 U. S. 736,

the Court reversed a sentence which was within the trial court's power to make because the trial court took into account inaccurate information as to previous arrests and convictions. The Court stated (at 740-741): "We are not at liberty to assume that items given such emphasis by the sentencing court, did not influence the sentence. . . . Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand."

In *Cooke* v. *United States*, 267 U. S. 517, one of the grounds for reversal of a contempt conviction based on the sending of a scurrilous letter to the judge was remarks made by the trial judge when pronouncing sentence which indicated that he considered the contempt which had been found to have been aggravated by other conduct of the alleged contemnor. The Court held that this procedure "was unfair and oppressive" (at 538).

In this case, even more than in *Townsend* and *Cooke*, the trial judge took into account, as shown by the express terms of his certificate, with respect to the sentences he pronounced an impermissible matter, namely that a conspiracy existed to impair his health and otherwise to attack him and the administration of justice. Accordingly, petitioners have been sentenced improperly and, in any event, excessively.

C

Rule 42(a) requires that "the order of contempt shall recite the facts." The contempt certificate states: "As isolated quotations from or reference to the transcript can give but a partial view of the acts, statements, and conduct above referred to, I hereby make the entire record part of these proceedings." The *Dennis* record, so incorporated, is over 15,000 printed pages.

Accordingly, the certificate, which is the only place in

which the judge undertakes to recite the facts, is not complete on its face. To know with precision what petitioners have been convicted of requires the reading of not only the certificate and order, but a huge quantity of additional material.

As a result, the certificate violates Rule 42(a), subjects the petitioners to possible double jeopardy, and vastly encumbers their right of appeal. So far as we are aware, no federal decision exists as to the significance of such an infringement of Rule 42(a). Under the decisions in states which have comparable requirements that a contempt order must recite the facts, it is clear that such incorporation by reference requires reversal. *Ex parte Battelle*, 277 Pac. 725 (Cal. Sup. Ct.); *People* v. *Truesdell*, 79 N. Y. Supp. (2d) 413. *Cf. People ex rel. Barnes* v. *Court of Sessions*, 147 N. Y. 290, 296; *People ex rel. Palmieri* v. *Marean*, 86 N. Y. App. Div. 278.

This Court should grant review in order to settle the novel question as to whether the federal courts may deal more loosely with the Rule than is permitted under similar provisions of state law.

Conclusion

The writ of certiorari should be issued and the judgment below reversed.

Respectfully submitted,

PAUL L. ROSS,
MARTIN POPPER,
160 Broadway,
New York, N. Y.

Of Counsel:
EARL B. DICKERSON,
Chicago, Ill.;
PATRICK H. O'BRIEN,
Detroit, Michigan;
ROBERT W. KENNY,
Los Angeles, California;
JOSEPH FORER,
Washington, D. C.;
BERNARD JAFFE,
New York, N. Y.

Of Counsel for Petitioner McCabe:
THOMAS D. MCBRIDE,
Philadelphia, Pennsylvania.